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Supreme Court, U.S.
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No. 00-1003

IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION;
SPRINGFIELD EDUCATION ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondent Massachusetts Labor Relations Commission has not filed a brief in opposition to the Petition for Writ of Certiorari. However, the respondents Springfield Education Association *et al.* ("unions") have filed an opposition. The petitioning employees, James J. Belhumeur *et al.*, ask consideration of their following reply.

I. The Respondents Cannot Paper Over the Conflict Between the Decision of the Court Below That an Eight-Year First-Amendment Procedure Is "Reasonably Prompt" and Circuit Court Decisions That Procedures in Excess of One Year Are Unconstitutionally Long and Burdensome.

A. This procedure is not saved by the fact that it is a creature of the state and operates in an unconstitutional manner.

Respondent unions do not deny that the First-Amendment procedure created by the Commonwealth of Massachusetts took eight (8) years in this case. The unions do not deny that this Court ruled that this procedure must be "reasonably prompt," *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 307 (1986). They do not deny that the Sixth, Seventh and Ninth Circuits, as well as a host of lower federal courts, have ruled *Hudson* procedures which take more than one (1) year are unconstitutionally burdensome. See Petition ("Pet."), pp. 18-19.

Instead, the unions wrongly argue there is no conflict because the procedures passed on by the circuit courts involved "facial challenges to the constitutionality of union-established procedures." Brief in Opposition ("Opp."), p. 6.

Is the constitutionality of a procedure saved because it was created by the Commonwealth of Massachusetts rather than a labor union?

Is the conflict eliminated because some lower courts predicted, as opposed to observed, that the procedure would be unconstitutionally long and burdensome?

These union-promulgated distinctions are frivolous and cannot mask the direct conflict between this decision and those of the cited circuit courts.

The foregoing arguments the unions claim are "more to the point." Opp. at 6. Their "less to the point" arguments are discussed next.

B. The employees are *not* disqualified from raising their free speech rights because they invoked the statutory *Hudson* procedure and vigorously pursued their rights.

The unions argue the petitioning employees cannot complain about the Commonwealth's unconstitutional *Hudson* procedure because they could have invoked the unions' internal *Hudson* procedure. Opp. at 5.[1]

Speculation that another procedure might have been more timely does not save the Commonwealth's burdensome eight (8)-year long procedure. As pointed out in the employees' Petition, the Supreme Judicial Court of Massachusetts originally assigned the obligation to hear agency

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[1] Massachusetts' highest court has twice commented that the unions' *Hudson* procedures were "not only cumbersome but designed to discourage all but the most zealous employee." *Harrison v. MSP/MTA/NEA*, 405 Mass. 56, 65 (1989); *School Comm. v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79 n.4 (1982). The unions have now modified those procedures, but no court has passed on them.

fee challenges to the Labor Relations Commission in 1982. The Commission held it was providing the *Hudson* procedure here and the Supreme Judicial Court agreed. Pet. at 10.

The unions also argue in a footnote (Opp. at 5, n.3) that the employees are responsible for the delay because they introduced 1,048 exhibits to the union's paltry 72 exhibits. The unions fail to mention in this comparison the 8,000 page transcript or the relative number of witnesses. The unions put forth 23 witnesses versus 2 witnesses for the employees. The trial pitted the credibility of contemporary union documents against testimony about what self-serving union witnesses recalled doing three years prior.

Notably, the unions do not suggest the employees are responsible for anything close to seven (7) years of delay. Seven (7) years represents the gulf between what the court below approved and what the circuit courts allow.

The unions point out (Opp. at 5, n.3) that this case resolved "hundreds of claims from many years." The employees could have demanded proof for each year and each level of the union. Instead, in their earnest desire to obtain a prompt but fair hearing, they agreed to streamline the litigation by reducing it to one representative year which would not only resolve the fee claims of the Massachusetts Teachers Association, but also the claims of the largest and most complex union, the National Education Association. Appendix ("App.") 26a.

II. The Proper Allocation of Overhead and Meeting Expenses Is Far from Settled.

The unions argue that this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) "settles" the issues of

allocating overhead and meeting expenses. Opp. at 7-8. The truth is that both sides claim *Ellis* because it does not directly address the issue of union overhead (such as accounting) expenses or the issue of co-mingled meeting expenses.

Only through analogy can these expenses be addressed. *Ellis* ruled on convention expenses and union newspaper expenses. 466 U.S. at 448-51. The unions argue that overhead and meeting expenses are like convention expenses (completely chargeable), while the employees argue they are more akin to union newspaper expenses (partially chargeable).

The matter is so far from settled that this Court's later opinion, *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991), questioned the 100% chargeability of convention expenses–the foundation of the unions' argument. The Court stated, "We need not determine whether petitioners could be commanded to support all the expenses of these conventions." *Id.* at 530. This is not the language used for a "settled" rule.[2]

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[2] The unions point out (Opp. at 9, n.6) an omission in the employees' citation to *Beck v. Communications Workers*, 776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (1986), *aff'd*, 487 U.S. 735 (1988). The employees omitted the citation to the page of the Circuit Court's decision which dealt with overhead expenses. On pages 1211-12, the Fourth Circuit said "'administrative [expenses]' was a catch-all, spread out over the other seven classifications on a proportionate basis, and appears to create no problems."

III. Vague Generalities Will Not Erase the Commission's Plain Statements About How It Applied the Burden of Proof.

The Labor Relations Commission described its decision making this way:

> After the MTA met its *prima facie* burden, the Charging Parties met their production burden by calling into question aspects of the Union's *prima facie* case. The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to non-members that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.

(App. 38a-39a) (footnotes omitted)

Later, the Commission continued:

> The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the [Hearing Officer's] Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and segregated. *We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.*

(App. 46a-47a) (emphasis added)

To undercut this unambiguous statement regarding how the Commission handled the burden of proof, the unions cite the Supreme Judicial Court which said: "the record is clear that the union introduced, and the commission credited, other evidence to support the allocation of staff time." App. 13a, n.12.

What the Commission did in allocating the burden of proof is plain. The Supreme Judicial Court's vague and generalized statement about unidentified "other evidence" cannot wipe away the Commission's clear explication of what it did.

It is generally true, as the unions assert (Opp. at 11), that this Court does not sit to review most factual disputes. However, in this case the procedure used for fact-finding drew the line on free speech rights. In this situation the Court has both the opportunity and the duty to review the factual determinations made below. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 567 (1995); *Bose v. Consumers Union*, 466 U.S. 485, 499, 508, n.27 (1984).

More importantly, the Commission's handling of this case, including the application of the burden of proof, demonstrates the truth of the employees' assertion that the time has come to end the *Street* experiment. That is discussed next.

IV. The Record in This Case Proves Justice Black's Prediction That the *Street* Experiment Unconstitutionally Burdens Employee Speech.

The unions argue the record in this case does not prove Justice Black's prediction. In *IAM v. Street*, 367 U.S. 740, 795-96 (1961) (Black, dissenting), Justice Black predicted that the *Street* remedy would create such high transaction

costs that, of necessity, it would unduly burden free speech rights. The record in this case–a 53-day hearing and 8,000 pages of transcript[3]–squarely proves his prediction.

Further proof is not far off. Only three union fee challenge cases have previously come before this Court with some record of how the union spent its money. Those three cases are: *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991); *Communications Workers v. Beck,* 487 U.S. 735 (1988) and *Ellis v. Railway Clerks,* 466 U.S. 435 (1984).

The circuit court decision in *Beck* described the nature of the trial proceedings as "six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings." *Beck v. Communications Workers,* 776 F.2d 1187, 1194 (4th Cir. 1985).

The district court in *Lehnert* noted that the case was filed in 1978, but was not tried until eight years later in 1986. Although it involved a relatively "modest" 12 trial days, 12 witnesses and 90 exhibits, *Lehnert v. Ferris Faculty Association,* 643 F. Supp. 1306, 1308 (W.D. Mich. 1986), the record was *not* complete. The trial judge referred to the "paucity of relevant evidence" and found that only 3.4% of the state affiliate's fees was chargeable. *Id.* at 1328-29. The judge referred to "sparse relevant testimony" with regard to the national affiliate of the union and found only 2.75% of its activities chargeable. *Id.* at 1330.

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[3] The unions argue (Opp. at 11) that the employees cannot use the $25,000 transcript fee as an illustration of the undue burden on them. Why? Because the testimony could have been taped and the employees instead could have listened to all 8,000 pages to find references for their briefs!

If it took 12 trial days to prove 2-3% of union fees, imagine how long it would take to present enough relevant evidence to prove 66%–the fee found appropriate in the instant case. The 53-day trial in the instant case pales in comparison.

Although the length of the *Ellis* trial on damages is not revealed, the case was filed in 1973, tried in 1978 and decided by the circuit court in 1982. *Ellis v. Railway Clerks*, 685 F.2d 1065, 1067-68 (9th Cir. 1982).

The difficulty of these cases is not something about which this Court needs to be convinced. In the recent case of *Board of Regents v. Southworth,* 529 U.S. 217, 232 (2000), this Court admitted its difficulty in arriving at chargeable expenses in *Lehnert* and frankly acknowledged the ordeal in "defin[ing] germane speech [expenses chargeable to objectors] with ease or precision."

There is now no doubt that Justice Black was right in condemning the *Street* "challenge" remedy. The question is simply whether this Court will continue to allow non-members who stand up for their free speech rights to continue to be frustrated, burdened and harassed by the high transaction costs of the *Street* remedy.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented herein on the most recent application of the *Street* experiment.

Respectfully submitted,

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